No. 88-1916

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT DARREN OLSON,

Respondent.

BRIEF OF THE STATES OF CONNECTICUT, DELAWARE, INDIANA, KANSAS, MICHIGAN, MISSISSIPPI, MISSOURI, NEW MEXICO, SOUTH CAROLINA AND VERMONT, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA'S PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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INTEREST OF AMICI

This brief is submitted by the amici States of Connecticut, Delaware, Indiana, Kansas, Michigan, Mississippi, Missouri, New Mexico, South Carolina and Vermont, the National District Attorneys Association (NDAA), and the Minnesota County Attorneys Association (MCAA) pursuant to Sup. Ct. R. 36.1 and 36.4 in support of the State of Minnesota's petition for a writ of certiorari.[1]

The interests of all the amici states are similar. The first issue raised in the petition is when a guest in another's home has a legitimate expectation of privacy. Many persons accused of violent crimes are highly mobile. Not infrequently, the evidence implicates a particular person and the police learn that, at least for the moment, they may be able to arrest him in another's home. The lower courts' decisions about when a guest has a legitimate expectation of privacy are inconsistent and the area is quite unsettled. Further guidance by this Court, such as the articulation of an explicit set of factors, would clarify matters and eliminate the need for prosecutors to revisit continually the same ground in the lower courts.

Also raised in the petition is the issue of exigent circumstances. This is closely related to the first issue, i.e. whether a guest has a legitimate expectation of privacy, because "the more fleeting a suspect's connection with the premises, such as when he is a mere visitor, the more likely that exigent circumstances will exist . . . ." *Steagald v. United States*, 451 U.S. 204, 231 (1981) (J. Rehnquist dissenting). If this Court should reach this issue, it could clarify the law and help prosecutors advise police agencies.

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[1] Pursuant to Rule 36.1, written consent of the parties to the filing of the brief by the amici associations is being filed at the same time as this brief. The amici states are sponsored by their respective attorneys general and therefore, pursuant to Rule 36.4, consent for them is not necessary.

The NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens. MCAA is the statewide organization representing all felony prosecutors in Minnesota and has some purposes similar to those of the NDAA, with a particular focus on the criminal justice system in Minnesota.

SUMMARY OF ARGUMENT

I.

The Minnesota Supreme Court held that respondent had "standing," as a guest, to challenge his warrantless arrest in the home of another. This Court has held that whether a guest has a legitimate expectation of privacy cannot be determined by a "bright line" rule and that the issue must be developed on a case-by-case basis. *Rakas v. Illinois*, 439 U.S. 128 (1978).

The lower courts have each developed their own, often inconsistent, lists of factors. This case is a good one in which to articulate appropriate factors or provide other guidance to achieve greater consistency.

II.

The Minnesota Supreme Court also held there were not exigent circumstances. Police officers in the field need cogent guidance so that they know when they can rely on the exigent circumstances exception.

Payton v. New York, 445 U.S. 573 (1980) left the initial application of the exigent circumstances exception to the lower

courts. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984). However, in the nine years since *Payton*, there have been many lower court decisions on the issue. *See* State of Minnesota's petition at 21-23. The facts and analyses available from these decisions would afford this Court a context and perspective from which to provide guidance and direction on the issue.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION SC THAT IT CAN ARTICULATE AND DISCUSS THE APPROPRIATE FACTORS TO CONSIDER IN DECIDING WHETHER A GUEST HAS A LEGITIMATE EXPECTATION OF PRIVACY.

This case raises the issue of when a guest in someone else's home has a legitimate expectation of privacy under the Fourth Amendment. The Minnesota Supreme Court held that respondent had "standing" to challenge his warrantless arrest in Louanne Bergstrom's duplex. The court relied upon two facts: first, respondent had permission to sleep overnight on the floor at Bergstrom's home; and second, he purportedly had the right (a fact which is unsupported in the record) to allow or refuse entry to visitors. *See* Petitioner's Appendix at A-8.

A. This Question Must Be Addressed On A Case-by-Case Analysis.

Rakas v. Illinois, 439 U.S. 128 (1978) rejected the "bright line" rule of "legitimately on the premises" and held that the question of when a guest has a legitimate expectation of privacy will have to be developed by a case-by-case analysis. *See*

discussion at 439 U.S. 144-148.[2] The development of a case-by-case analysis necessarily entails analyses and decisions by the lower courts in order to identify pertinent factors and to develop analyses based on a broad range of factual situations. However, as the following discussion shows, the lower court decisions are inconsistent and it is now appropriate for this Court to give some more direction to the case-by-case analysis.

B. The Lower Courts Have Been Considering Widely Disparate Factors.

In 1982, *United States v. Lochan*, 674 F.2d 960, 964 (1st Cir. 1982) observed:

> [T]he standards for determining how far a defendant's personal fourth amendment rights extend, the limits of what constitute a reasonable expectation of privacy, are not yet settled.
>
> . . . The *Rakas* Court did not, however, specifically set out the factors that bear on the existence of a reasonable expectation of privacy, but it did make several points.

Based upon this perception, the lower courts have articulated their own factors, either explicitly or implicitly. *See, e.g., United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981); *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982); *United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*,

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[2] *See also United States v. Salvucci*, 448 U.S. 83, 92 (1980), which implicitly rejected possession of a seized good as a "bright line":

> We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.

468 U.S. 1217 (1984); *United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984). It is apparent that these cases do not all consider the same factors. The factors listed or discussed by these seven cases, for example, include:

1. Ability or right to exclude other persons from the premises that was searched, whether based upon property rights or upon other considerations. (*Aguirre*, *Haydel*, *Lochan*, and *Rackley*.)
2. The accused's historical (or prior) use of the property that was searched. (*Aguirre*; *see also*, *McIntosh*, *Perez*, and *Rackley*.)
3. The legitimacy of and reasons for the accused's presence, if any, in the searched area. (All seven cases.)
4. The presence or absence of the accused's personal effects at the searched premises and how long they were kept there. (*Perez*, *Rackley*, and *McIntosh*.)
5. The precautions taken by the accused to develop and maintain his privacy in the premises. (*Haydel*.)
6. The accused's subjective expectation of privacy and the reasonableness of that expectation. (*McIntosh*, *Haydel*, and *Lochan*.)
7. The accused's property rights in any property that was seized. (*McIntosh*, *Haydel*, and *Lochan*.)
8. The accused's control of the seized property. (*McIntosh*; *see also*, *Echegoyen*.)

Rakas said this about the ability to exclude others from the premises, which is the first factor listed above:

> One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries*, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

439 U.S. at 144, n. 12.[3] On the other hand, one who cannot exclude others will often have little expectation of privacy. The significance of this factor is apparent. Yet three of the seven cases cited above do not consider or address the right to exclude others. *See Echegoyen*, *McIntosh*, and *Perez*. As for the Minnesota Supreme Court in this case, it considered the right-to-exclude factor in only the most cursory fashion. *See* Petitioner's Appendix at A-8. And it did not discuss at all many of the other factors listed above, or any of the seven cases cited as examples herein.

All courts should consider the same relevant factors and arrive at consistent results in determining whether a guest has a legitimate expectation of privacy in another's premises. Unfortunately, they do not. The disparate results are exemplified by *United States v. Rackley*, *United States v. Perez*, and this case.

In *Rackley*, the accused had a key; in *Perez*, he did not; in this case respondent did not.[4] In *Rackley*, the property's lessee testified that the accused had the right to exclude other people from the house; in *Perez*, there was no such testimony; in this

---

[3] *See also*:

(1) *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980): "Nor did petitioner have any right *to exclude* other persons from access to Cox's purse." (Emphasis added.)

(2) *United States v. Salvucci*, 448 U.S. 83, 91 (1980): "While property ownership is clearly a factor to be considered . . . [citing the just-quoted footnote from *Rakas*, which includes possession of property and the right to exclude]."

[4] The accused has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Rakas v. Illinois*, 439 U.S. at 131, n. 1. The opinion in *Perez* makes no mention of the guest having a key and, since the accused has the burden, it must be presumed that he had none.

case, "It was never discussed." [5] In *Rackley*, the accused brought clothing with him when he stayed at the house; in *Perez*, the accused arrived with luggage; in this case respondent had a few extra clothes in a bag, but no toothbrush. In *Rackley*, the accused did not stay at the house the night before the raid, but had stayed there several times during the preceding month; in *Perez*, the accused arrived from out-of-town and stayed at the house, apparently without sleeping, for approximately 2 hours and 15 minutes before leaving in his host's car and being arrested; in this case, petitioner stayed overnight the night before his arrest.

The facts in *Rackley* are if anything more favorable for the accused's position than those in *Perez* and in this case, especially when one considers the important factor of the ability to exclude. Only Rackley had a key. This meant he could come when the leasee was not there and gave him the *de facto* ability to exclude others when he was there alone. Yet *Perez* and this case held there was standing and *Rackley* held there was not. The outcomes undoubtedly were different because the courts did not consider the same factors.

C. Contrary To *Rakas v. Illinois*, Some Lower Courts Are Using A "Bright Line" Test.

Perez, *McIntosh*, and *Echegoyen* also seem to ignore the holding of *Rakas* that a "bright line" is inappropriate. *Perez* said:

> The *Rakas* decision indicates that the Supreme Court would now deny standing to a "casual visitor" to a house that is searched if the visitor has never been to a room

[5] The Minnesota Supreme Court said that Louanne Bergstrom testified that respondent had the right to allow or refuse visitors entry. As noted in the petition, there is no support in the record for such a statement. *See* Petition at 7.

> searched, or was in the room only one minute before the search began. (Citations omitted.)
>
> In the case at bar, however, the evidence indicates that Quentero and Banados were not "casual visitors" within the meaning of *Rakas*.

700 F.2d at 1236. Thus, *Perez* took *Rakas*' two examples of casual visitors and turned them into a "bright line" rule.

McIntosh said:

> The question of standing gives us little pause. . . . McIntosh had been residing at this dwelling as the Shurns' guest for several days and had a legitimate expectation of privacy within the residence.

857 F.2d at 467. *Echegoyen* said:

> It is clear that defendant's mere presence at the place searched would not give him standing. *Rakas*, 439 U.S. at 142-143, 99 S.Ct. at 429-30. But, . . . Echegoyen was an invited overnight guest who had permission to be on the premises when the searches occurred.

799 F.2d at 1277.[6] Thus, *McIntosh* and *Echegoyen* established their own "bright line" test, namely that every overnight guest has "standing." [7]

[6] *Echegoyen* also based its decision on the fact that the accused "with his involvement in the cocaine processing operation, would have had an interest in the items seized." 799 F.2d at 1277. The equipment seized, however, was apparently neither owned nor controlled by Echegoyen, but was instead owned or controlled by someone who was associated with him in some way, if not as a co-conspirator, in the illegal cocaine business.

[7] This "bright line," in addition to being inconsistent with a legitimate expectation of privacy in many—if not most—cases, would be no more helpful than the "legitimately on the premises" "bright line" that was rejected in *Rakas*. There are numerous types of overnight guests ranging from someone from out of town who stays for several weeks or even months to a dinner or party guest who has too much to drink, passes out and is allowed to remain on the floor or the couch until morning.

D. This Case Provides An Appropriate Factual Setting In Which To Articulate Relevant Factors.

Many of the factors listed *supra* at 6 could apply to this case. This provides an opportunity to articulate the relevant factors in a concrete setting. For example, this Court could articulate the scope of the right to exclude as a factor by comparing the facts of this case with the completely different facts in *Jones v. United States*, 362 U.S. 257 (1960), a case in which the guest had the right to exclude others and also had a legitimate expectation of privacy. *See Rakas v. Illinois*, 439 U.S. at 149.

During the week before the search in *Jones*, the owner or lessee of the premises was out of town. Jones had a key and could come and go at will. Once inside the apartment, he and only he could decide whether anyone would be admitted. His dominion was complete until such time as the owner might come back. *See Rakas v. Illinois*, 439 U.S. at 149.

In this case, respondent had no key to the duplex. He was never left alone there. When his hostess left, he left with her, and did not return until she returned. As for respondent having the owner's permission to refuse to admit anyone, "it was never discussed." Nor was there any need to discuss it since Ms. Bergstrom was there every minute that petitioner was present as a guest and was perfectly able and capable to decide whom to admit and whom to exclude. Ms. Bergstrom would have allowed respondent to have visitors "if I saw no reason not to." Saying that this was the extent of petitioner's authority is tantamount to saying he had no authority at all. And of course, permission to have visitors is of much less significance to privacy expectations than is the right to exclude.

II. IF THIS COURT REACHES THE EXIGENT CIRCUMSTANCES ISSUE, IT CAN PROVIDE HELPFUL GUIDANCE TO POLICE OFFICERS IN THE FIELD.

The Minnesota Supreme Court also ruled that there were not exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981), respectively required a warrant to arrest a suspect in his own home and a search warrant to arrest a suspect in another's home, unless there was consent or exigent circumstances. However, since exigent circumstances was not raised in either *Payton* or *Steagald*, they did not consider its scope, "thereby leaving to the lower courts the initial application of the exigent circumstances exception." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984).

Welsh v. Wisconsin considered the application of the exigent circumstances exception. However, the fact that the offense involved in that case (a *civil* drunk driving charge) was relatively minor was deemed dispositive so that there was no need to discuss other aspects of the exception. Thus, when *Welsh* referred to *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), an often-cited lower court decision that has articulated seven different factors related to exigent circumstances, it said:

> Without approving all of the factors included in the standard adopted by that court [*Dorman*], it is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis.

466 U.S. at 752.

Thus, the relative gravity of the offense was dispositive in *Welsh*. However, in most cases where the exigent-circumstances exception may apply to an arrest in the suspect's or another's house, the crime (as in this case) is very serious. In such cases, police officers cannot refer to *Welsh* to resolve any uncertainties about whether exigent circumstances exist.

If this Court should reach the exigent-circumstances issue, it will have the opportunity to expound clear, easily understood guidelines for officers. Such guidance is critically needed:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. . . .
>
> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances.

Payton v. New York, 445 U.S. at 618-619, and at 619 (J. White dissenting). If there is a mistake in arresting, valuable evidence may be lost. If there is a failure to arrest, a dangerous criminal will be at large. *Id.* In providing this guidance, the Court will have the benefit not only of the concrete facts of this case, but also of the facts and analyses of many other lower court decisions since *Payton* and *Steagald*.

Propounding the precise scope of exigent circumstances appears to be more properly addressed in detail in a brief on the merits. However, the scope should be clear and easily understood by the officers on the street. For example, the numerous factors in *Dorman v. United States* are not particularly helpful to officers who must act with dispatch. *See* 2 W. LaFave, *Search and Seizure*, section 6.1(f) at 599-600 (2d ed. 1987).

CONCLUSION

This Court should grant the petition of the State of Minnesota in order to decide the important issues presented.

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Respectfully submitted,

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